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No. 1966

In the Supreme Court of the United States

October Term, 1962

MARIO M. HOLZOGEL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTEENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

LEON ULMAN,
Assistant Attorney General,

JOSEPH M. HOWARD,
Special Assistant,

Department of Justice,
Washington 25, D. C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	2
Argument	3
Conclusion	12

CITATIONS

Agnew v. *United States*, 165 U.S. 36	6
Connelly v. *United States*, 249 F. 2d 576, certiorari denied, 356 U.S. 921	6
Frantz v. *United States*, 62 F. 2d 737	6
Frazier v. *United States*, 335 U.S. 497	5
Holland v. *United States*, 348 U.S. 121	9
Holt v. *United States*, 218 U.S. 245	7
Janko v. *United States*, 281 F. 2d 156, reversed, 366 U.S. 716	7
Jarl v. *United States*, 19 F. 2d 891	6
Kleven v. *United States*, 240 F. 2d 270	7
Lewis v. *United States*, 279 U.S. 63	5
Myers v. *United States*, 15 F. 2d 977	6
Ruthenberg v. *United States*, 245 U.S. 480	6
Ryan v. *United States*, 99 F. 2d 864	6
Spencer v. *United States*, 169 Fed. 562	6
Spies v. *United States*, 317 U.S. 492	10
Stroud v. *United States*, 251 U.S. 15	5
Thiel v. *Southern Pac. Co.* 328 U.S. 217	5
Tinkoff v. *United States*, 86 F. 2d 868, certiorari denied, 301 U.S. 689	7
United States v. *Alker*, 260 F. 2d 135, certiorari denied, 359 U.S. 906	10
United States v. *Ford*, 237 F. 2d 57, certiorari granted, 352 U.S. 1000, certiorari dismissed, 355 U.S. 38	9

Cases—Continued Page

United States v. *Skidmore*, 123 F. 2d 604, certiorari denied, 315 U.S. 800 6
United States v. *Taylor*, 305 F. 2d 183 10
United States v. *Wood*, 299 U.S. 123 5
Walker v. *United States*, 93 F. 2d 383 6
Walker v. *United States*, 116 F. 2d 458 6

Statutes:

Internal Revenue Code of 1954, Sec. 7201 (26 U.S.C. 1958 ed., Sec. 7201) 2, 3
28 U.S.C., Sec. 1865(a) 5

Miscellaneous:

Hearings before the Select Committee on Improper Activities in the Labor or Management Field, United States Senate, 86th Cong., 1st Sess., Part 53, pp. 18779-18780 8

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 1046

METRO M. HOLOVACHKA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals is reported at 314 F. 2d 345. (Pet. 1a-32a.)

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1963. (Pet. 33a.) Petition for rehearing was denied by the court *en banc* on March 28, 1963. The petition for a writ of certiorari was filed on April 24, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the District Court abused its discretion in excluding residents of Lake and Porter Counties from the petit jury panel, or in ordering that the jury not be permitted to separate during the trial of the case.

2. Whether petitioner was prejudiced by the conduct of the prosecuting attorney or the rulings of the District Court.

3. Whether the evidence was sufficient to support the verdict.

4. Whether the District Court properly excluded certain evidence offered by petitioner.

STATUTE INVOLVED

Internal Revenue Code of 1954:

> SEC. 7201. ATTEMPT TO EVADE OR DEFEAT TAX.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

(26 U.S.C. 1958 ed., Sec. 7201.)

STATEMENT

On January 12, 1962, an indictment in three counts was filed against petitioner in the United States District Court for the Northern District of Indiana,

charging that he had wilfully attempted to evade and defeat his income taxes for the years 1955, 1956, and 1957 by filing false and fraudulent tax returns, in violation of Section 7201 of the Internal Revenue Code of 1954. The indictment alleged that he had reported an income tax liability of $11,893.81 for 1955, $10,486.75 for 1956, and $16,850.87 for 1957, whereas his correct tax liability for those years was $22,151.54, $31,523.91 and $24,893.48 respectively. (R. 10-12.)[1] After a jury trial lasting three weeks, petitioner was found guilty on all counts. On March 16, 1962, the District Court imposed concurrent sentences of imprisonment for three years on each of these counts, and a fine of $10,000 on Count One. (R. 59-60.) The Court of Appeals affirmed. (Pet. 1a-32a.)

The evidence to support the verdict of guilt is reviewed at length in the opinion of the Court of Appeals (Pet. 17a-24a), to which the Court is respectfully referred. The particular facts with respect to each of the points raised by petitioner are presented below in connection with our discussion of those issues.

ARGUMENT

1. There is no merit to petitioner's contention (Pet. 9-13) that he was prejudiced when the trial court excluded residents of Lake and Porter counties from the petit jury panel.

On November 13, 1961, the date this case was or-

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[1] References to petitioner's appendix in the Court of Appeals will be designated "R."

iginally set for trial, petitioner filed a motion to strike the jury panel on the ground that a newspaper story, appearing the previous day in the "Hammond Times", had created an atmosphere prejudicial to a fair trial. (R. 89.) In support of this motion, petitioner's counsel stated (R. 89):

> We think that it is again, in view of the results of this Jury selection, the number of people from Hammond, and the number of people from this one precinct, it is a basis indicating that the Defendant can not get a fair and impartial trial from this Jury and we ask again that this Jury be dismissed and a new panel selected.

Following the dismissal of the original jury panel on the ground that it was illegally constituted (see Pet. 4), a new trial date was set for January 22, 1962. On January 12, 1962, after a superseding indictment was returned against petitioner,[2] there appeared a front page article in the "Gary Post Tribune" which repeated much of the material about which petitioner had previously complained to the court. (R. 90-91.) As a result of the widespread publicity given this matter, the trial court, after careful consideration and in order to insure a trial before an impartial jury, (R. 65-95), ordered the exclusion from the panel of jurors who resided in Lake and Porter Counties, the areas in which the newspaper articles had circulated.

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[2] The original indictment, upon motion of the Government, was dismissed on the ground that the grand jury was illegally constituted. (See Pet. 4.)

Petitioner, who first complained that, in view of the unfavorable publicity, he could not obtain an impartial jury from the Gary and Hammond areas (R. 89), now contends that he was prejudiced by excluding those areas from the district from which the panel of talesmen was drawn. We submit that, on the contrary, Judge Grant's order implemented the command of 28 U. S. C. Section 1865 (a) that:

> * * * petit jurors shall from time to time be selected from such parts of the district as the court directs *so as to be most favorable to an impartial trial*, * * * (Emphasis supplied.)

Since the "mode in which the jury shall be selected" was left by the Sixth Amendment "in the discretion of the legislature, with no restriction or limitation, except that the accused should have the right to be tried by an impartial jury" (*United States* v. *Wood*, 299 U. S. 123, 146; *Frazier* v. *United States*, 335 U. S. 497, 511), the proper inquiry is whether the jury was selected from such parts of the district "so as to be most favorable to an impartial trial" within the meaning of the statute. See *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 221. This determination of necessity calls for an exercise of discretion by the trial court (*Frazier* v. *United States*, *supra*, p. 511; *Stroud* v. *United States*, 251 U.S. 15, 20), and there is no showing of abuse in this case.

The selection of an impartial jury from part of a district to avoid local prejudice has been consistently sanctioned by this Court. *Lewis* v. *United States*, 279 U. S. 63, 72; *Stroud* v. *United States*, *supra*, pp. 18-20 (exclusion of county of Leavenworth on claim of

local prejudice); *Ruthenberg* v. *United States*, 245 U. S. 480, 482; *Agnew* v. *United States*, 165 U. S. 36, 42-45. The courts of appeals have approved similar action on closely analogous facts. *Spencer* v. *United States*, 169 Fed. 562 (C. A. 8) (order excluded jurors from Polk County, Iowa, including the city of Des Moines); *Jarl* v. *United States*, 19 F. 2d 891, 894-895 (C. A. 8), and *Myers* v. *United States*, 15 F. 2d 977, 979 (C. A. 8) (orders excluded Douglas County including the city of Omaha, Nebraska); *Walker* v. *United States*, 93 F. 2d 383 (C. A. 8), and *Ryan* v. *United States*, 99 F. 2d 864, 870-871 (C.A. 8) (order excluded Jackson County including Kansas City); *Connelly* v. *United States*, 249 F. 2d 576, 583-584 (C. A. 8), certiorari denied, 356 U. S. 921 (order excluded jurors from city and County of St. Louis); *Walker* v. *United States*, 116 F. 2d 458, 462 (C. A. 9) (order excluded jurors from Clark County, Washington); *Frantz* v. *United States*, 62 F. 2d 737, 738-739 (C. A. 6) (order excluded jurors from Bay City, Michigan). And cf. *United States* v. *Skidmore*, 123 F. 2d 604, 607-608 (C. A. 7th), certiorari denied, 315 U.S. 800.

Nor is there any merit to petitioner's contention (Pet. 14) that he was prejudiced by the action of the trial court in keeping the jury together during the course of the trial. The decision to do so was entirely proper and consistent with the initial exclusion from the jury of those residing in Lake and Porter Counties. Having provided for a jury panel that resided outside the area of the unfavorable publicity,

the trial judge did not wish to have his attempt to achieve impartiality nullified by risking exposure of the jury to publicity which was bound to occur during the course of the trial. Indeed, on the first day of the trial, petitioner moved for a three-month continuance as a result of newspaper articles, which appeared shortly before trial, in the "Gary Post Tribune" and the "Hammond Times." (R. 112-113.) For the very purpose of keeping the jury free from such publicity, the trial judge kept them together throughout the trial. In so doing, he instructed the jury to refrain from listening to or watching any news programs on radio and television, or reading any newspapers until the marshal had first deleted therefrom any stories concerning the trial. (R. 115.) It is clear that the trial court's decision to sequester the jury, designed as it was to insulate them from local prejudice, was a sound exercise of its discretion. *Holt* v. *United States*, 218 U. S. 245, 250-251; *Tinkoff* v. *United States*, 86 F. 2d 868, 879 (C. A. 7th), certiorari denied, 301 U. S. 689; *Janko* v. *United States*, 281 F. 2d 156, 170 (C. A. 8th), reversed on other grounds, 366 U. S. 716; *Kleven* v. *United States*, 240 F. 2d 270, 273 (fn. 1) (C. A. 8th), and cases cited therein.

2. Petitioner complains (Pet 14-16) that he was prejudiced by certain incidents which occurred during the trial.

(a) On cross examination, in answer to a question asking what he did with certain records obtained from petitioner, Richard G. Sinclair, a former investigator for the McClellan Committee, stated that he

"used it as a basis to testify before the Labor Rackets Committee in Washington, D. C., in June of 1959." (R. 155.) Since the McClellan Committee was popularly referred to by that name (R. 157), there is no reason to believe that Sinclair's single reference to the "Rackets" Committee represented an attempt to prejudice petitioner before the jury. No further reference to the "Rackets" Committee was made during the trial, and there is no indication that prejudice resulted.

(b) On cross examination, the prosecuting attorney asked petitioner whether, during the prosecution years, he had received "any money in graft payments." (R. 1133.) This question followed a pattern of evidence, previously introduced at the trial, which revealed that petitioner was attempting to conceal the source of his income. This was indicated by petitioner's failure to keep books and records (R. 477, 483, 500) and his inability to recall the names of any clients from whom the bulk of his income allegedly came. (R. 1132-1133.) In addition, it was established that petitioner had carried on his financial transactions largely through the use of currency, totalling $342,919, during the years 1952 through 1957. (Ex. 187.) The receipt and use of such extensive amounts of currency strongly indicated that petitioner was seeking to cover up the source giving rise to these transactions.[3]

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[3] This suspicion was also supported by evidence brought out at an earlier date during the McClellan Committee's hearings, a transcript of which was part of the record in this case. See, *Hearings before the Select Committee on Improper Activities in the Labor or Management Field*, United States Senate, 86th Cong., 1st Sess., Part 53, pp. 18779-18780

In view of this previously related pattern of events, the prosecuting attorney felt that he had a logical basis on which to direct his question concerning the receipt of graft (R. 1134), designed, as it was, to further buttress the Government's position that petitioner's unreported income derived from some "taxable source". *Holland* v. *United States*, 348 U.S. 121, 137; cf. *United States* v. *Ford*, 237 F. 2d 57, 60, 65 (C. A. 2d), certiorari granted, 352 U.S. 1000, certiorari dismissed, 355 U.S. 38. The trial court, however, took the view that the question was improper, instructed the jury to disregard it, and directed that it be given no weight in their consideration of the case. (R. 1135.) It is evident that the immediate corrective action taken by the trial court guarded against any likelihood of prejudice.

(c) Petitioner's remaining complaint (Pet. 15) is apparently directed to the admission of the following evidence: (1) that he failed, in violation of Indiana law, to register with the County Clerk the assumed names of the H & M Realty and H & M Construction Companies (R. 1072-1075), organizations formed by him for the purpose of holding title to certain assets; (2) that the alteration, at his direction, of a certain mortgage was an attempt to evade the tax on this transaction due the State of Indiana (R. 1043); and (3) that he caused a 1957 Lincoln automobile, purchased by him, to be registered in the name of his father-in-law, Reverend Alexander Papp, in order to secure the property tax exemption afforded clergyman. (R. 1078.) The only matter to which petitioner offered objection was item (1) (R. 1073-1074), and

this objection was not well founded, since it is not only clear that the failure to register the assumed names under Indiana law was part of petitioner's pattern of concealment, but it is fundamental that "if the tax-evasion motive plays any part in such conduct the offense may be made out even though the conduct may also serve other purposes such as concealment of other crime." *Spies* v. *United States*, 317 U.S. 492, 499. As to items (2) and (3) above, aside from the fact that no objection was made, it is clear that this evidence was admissible on the issue of intent. *United States* v. *Taylor*, 305 F. 2d 183, 185 (C. A. 4th); *United States* v. *Alker*, 260 F. 2d 135, 157 (C. A. 3d), certiorari denied, 359 U. S. 906.

3. Petitioner contends (Pet. 16-23) that the evidence, as to each element of the offense, was insufficient to support the jury's verdict. The evidence against petitioner is reviewed at length in the thoroughly considered opinion of the Court of Appeals. (Pet. 17a-29a.) That court, viewing the evidence in the light most favorable to the Government, concluded "that there was more than a substantial basis on this record to justify the guilty verdict". (Pet. 17a.) This Court need not further review the unanimous determination of the court below.

4. Petitioner contends (Pet. 23-27) that the trial court erroneously refused to permit him to introduce into evidence his original net worth statement (Deft. Ex. 22), which reflected his theory regarding the return of his principal investment in Barrett Bonds. However, the trial court's action was plainly correct. The repayment of an amount of principal on a bond

owned by a taxpayer has no effect at all upon the taxpayer's net worth. The asset represented by the amount still due on the bond is reduced but the taxpayer's other assets are increased in an equivalent amount by virtue of his receipt of the repayment. There is thus no change in the taxpayer's net worth and the transaction has no effect upon a determination of unreported taxable income by the "net worth" method. Under petitioner's theory the bond asset would be reduced by every repayment of principle but the amounts thus received would not be treated as having increased the amount of other assets for purposes of determining the amount of unreported taxable income. Thus, as noted by the court of appeals (Pet. 23a-24a), the amount of his net worth would be reduced by every repayment of principal and the amount of unreported taxable income would be correspondingly reduced. Since this treatment was plainly erroneous and misleading, the district court correctly refused to permit petitioner to enter his original net worth statement into evidence.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

LOUIS F. OBERDORFER,
Assistant Attorney General.

JOSEPH M. HOWARD,
NORMAN SEPENUK,
Attorneys.

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